STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs No. 152840

DARIUS LAMARR FRANKLIN,

Defendant-Appellant.

Court of Appeals No. 322655
Circuit Court No. 14-003800-FH

PEOPLE'S SUPPLEMENTAL BRIEF
IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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I.

Franks v Delaware **limits the scope of granting a hearing challenging the veracity of a search warrant to cases where a defendant makes a substantial offer of proof, verified by affidavits or sworn or otherwise reliable statements of witnesses, that point out specifically where the warrant affiant intentionally or recklessly provided false information necessary to the finding of probable cause. Here, the judge ordered a *Franks* hearing based on conclusory allegations and a mere desire to cross-examine the affiant. Did the Court of Appeals correctly apply *Franks v Delaware* by setting aside the trial court's grant of a *Franks* hearing where Defendant failed to meet his burden?**

The People answer: YES
Defendant answers: NO

OBJECTION TO DEFENDANT'S STATEMENT OF FACTS

The People object to Defendant's statement of facts in both his Application for Leave to Appeal and his Supplemental Brief.[1] The following representations by Defendant regarding what offer of proof he made to Judge Bruce Morrow at the June 11, 2014 hearing are demonstrably false. Because the issue before this Court is whether the Court of Appeals erred by ruling that Defendant's affidavit *alone* was an insufficient basis upon which to grant a *Franks* hearing, the exact nature of Defendant's offer proof at June 11th hearing is critical to this appeal. Accordingly, the People must point out important misrepresentation made by Defendant in his pleading to this Court.

Defendant states in his pleadings before this Court:

- "Defense counsel produced two witness affidavits. . . of himself and the next door neighbor that disputes the use of the front door, heavy traffic, and the existence of the 27 year old black male seller."[2]
- "In deciding whether to grant Defendant's motion for a *Franks* hearing, the trial judge reviewed the affidavits of Ms. Jones and Mr. Franklin, which disputed the heavy front-door traffic as alleged in the affidavit."[3]
- "The photographs show the route of the phantom buyers and the neighbor's clear, unobstructed view of the Defendant's home."[4]
- "In order to decide on Defendant's motion for a Franks hearing, "[t]he court reviewed the photographs of the location showing an unobstructed view from Mrs. Jones's home to the target location."[5]

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[1]The People have also filing a motion to strike along with this brief.

[2]Defendant's Supplemental Brief, page 5.

[3]Defendant's Application for Leave to Appeal, page 1.

[4]Defendant's Supplemental Brief, page 5.

[5]Defendant's Application for Leave to Appeal, page 1

These statements are false. In the trial court, Defendant filed two motions: a Motion for Hearing to Suppress Unlawfully Seized Evidence Pursuant to Invalid Search Warrant and a Motion for Hearing to Suppress Unlawfully Seized Evidence Pursuant to Franks v Delaware.[6] Defendant did not attach *any* affidavits to these pleadings.[7] The Prosecutor filed a reply brief in which he argued, "Defense presented no offer of proof, affidavit or sworn or otherwise reliable statement of witnesses, or satisfactory explanation of their absence as required for a hearing."[8] Defendant's motions were heard by Judge Morrow on June 11, 2014, starting at 10:24 a.m.[9] The Circuit Court file shows that an affidavit by Defendant was faxed from defense counsel's office to Judge Morrow's courtroom ten minutes before Defendant's case was called.[10] Defendant's affidavit is the only defense-witness affidavit filed with the circuit court.[11] Defense counsel did not serve the Prosecutor with Defendant's affidavit.[12] It is unclear whether Judge Morrow saw Defendant's affidavit prior to his order granting a *Franks* hearing; however, it is clear is that, contrary to Defendant's

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[6]See Circuit Court file. Note: the Wayne County Clerk's Office erroneously stamped the filing date of Defendant's pleadings as "2014 May 33."

[7]See Circuit Court file.

[8]See Circuit Court file/ Attachment 1, People's Response to Defendant's Motion to Suppress and for Hearing to Suppress Pursuant to Franks v Delaware.

[9]6/11/14, 3.

[10] See Attachment 2, copy of Defendant's affidavit, dated June 11, 2014, obtained from Circuit Court file. The top of this documents indicates, "2014-06-11 10:14 Law Office of RPU 12485691442 1/1."

[11]See Circuit Court file.

[12]See Attachment 3, Affidavit of Assistant Prosecutor Haddy Abouzeid.

representations to this Court, Defendant never filed an affidavit by Angela Jones with the circuit court.[13]

This point is further supported by Defendant's *own* brief on appeal to the Court of Appeals, filed on February 3, 2015.[14] In his Counter-statement of Facts, Defendant states that he filed *one* affidavit with the trial court in support of his motion for a *Franks* hearing:

> In support of Defendant's motion for a Franks hearing, the Defendant provided *an affidavit* which stated that the Defendant's front door was not used, which directly contradicted the allegation of heavy traffic as stated in the search warrant. The affidavit further showed that it was not possible that an individual exited the front door to speak to the police.[15]

After he lost in the Court of Appeals, Defendant's changed his statement of facts in his pleadings before this Court. As reflected above, Defendant alleged in his Application for Leave to Appeal and his Supplemental Brief, for the first time, that he produced *two* affidavits *and* photographs to Judge Morrow and that the judge granted his motion for a *Franks* hearing based on his review of all of these items.[16]

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[13]See Circuit Court file and Court of Appeals file.

[14]See Court of Appeals file.

[15]See Defendant/Appellee Brief on Appeal, Page 5. (Emphasis added)

[16]Defendant did not provide these photographs until he introduced them into evidence, as exhibits A, B and C, at the *Franks* hearing, on July 2, 2014. 7/2/14, 6-7. See also Attachment 3, Affidavit of Assistant Prosecutor Haddy Abouzeid.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

On March 21, 2014, a 36th District Court Judge authorized an order for the police to search 15786 Freeland, Detroit. Detroit Police Officer Lynn Moore was the affiant on that search warrant.[17]

In paragraph 3 of the affidavit, Officer Moore stated that, on March 11, 2014, an "unregistered confidential informant" (CI) told him that the location of 15786 Freeland was "involved in a high amount of marijuana trafficking." Officer Moore stated that he had used the CI "numerous times prior...(over 10 times)....resulting in confiscations of narcotics, weapons, and multiple felony arrest."

Based on that information, Officer Moore set up surveillance at 15786 Freeland, on March 21, 2014. His observations are reflected in paragraph 5 of the affidavit. Within thirty minutes, Officer Moore observed five occasions in which unknown individuals walked to the main entry door of the address, the seller (described in the search warrant) opened the door and the security gate, had a short conversation with the unknown indivual, and allowed that individual to enter the house. On each occasion, the unknown individuals exited the house within one minute of entering, and walked away in different directions. The affiant stated that he approached the last of these unknown individuals and asked if the location of 15786 Freeland was open for sales of marijuana. That individual replied, "Yah, they up right now just go to the front door and they will hook you up."

The case was assigned to Circuit Court Judge Bruce U. Morrow. On June 11, 2014, defense counsel moved to quash the search warrant, arguing that, based on the four-corners of search warrant, the search warrant lacked probable cause because 1) the affidavit did not show that the unregistered confidential informant was credible and reliable, 2) the affiant had no personal

[17]Attachment 4, search warrant of 15786 Freeland, dated March 21, 2014.

knowledge that the house was used for drug sales, and 3) Officer Moore never witnessed any hand-to-hand exchanges on March 21st. Defense counsel also suggested that Officer Moore's testimony about seeing five people enter and exit 15786 Freeland was untruthful: "we have reason to believe that they don't exist."[18]

After hearing arguments from both sides on the issue of probable cause, Judge Morrow held that the warrant was supported by probable cause. He stated that, in spite of the "BS" contained in paragraph 3 of in the affidavit, "what is contained in number five is sufficient for the issuance based on there being a fair probability that drugs would be found at the address of 15786 Freeland in the city of Detroit."[19]

Judge Morrow then turned to Defendant's second argument, that "the [affiant] is lying and that he didn't make the observations that he made on 3/21. So, we'll hear that."[20] Judge Morrow ordered the affiant to "provide this Court with all the times that that affiant has used this unregistered confidential informant on search warrants and the return of search warrants for all that were issued for this unregistered confidential informant and that whatever field notes that are used so that this Court can be assured that the unregistered confidential informant is the same one."[21] Judge Morrow explained that he wanted to review those records "in order to establish the credibility of the affiant":

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[18]6/11/14, 3-4.

[19]6/11/14, 13.

[20]6/11/14, 12-13. See Attachment 2, a copy of Defendant's affidavit, dated June 11, 2014, obtained from Circuit Court file, showing that this affidavit was faxed from defense counsel's office to Judge Morrow's courtroom ten minutes before Defendant's case was called. It is unclear whether Judge Morrow saw Defendant's affidavit prior to his order granting a *Franks* hearing.

[21]*Id.*

"whether the affiant is reckless or careless, was a blatant liar. . . .as it relates to March 21st, 2014."[22] *Only after* Judge Morrow ordered the hearing, defense counsel mentioned an offer of proof, stating, "Your Honor, my witnesses, just to give this Honorable Court a proffer, my witnesses are two points. The young lady across the street. The second on the witness -- Those are just friends. The second witness is just the defendant himself about that front door is never used. . ."[23]

The prosecutor objected, arguing that the defense had failed to make a sufficient showing to warrant a hearing under *Franks v Delware*. Judge Morrow simply replied, "Okay, It's on the record."[24]

The *Franks* hearing was held on July 2 and July 3, 2014. Defendant's first witness was Angela Jones, Defendant's neighbor and friend who lived across the street from Defendant's house. Defense counsel introduced photographs that showed Jones's view of Defendant's house.[25] While Jones testified that she had never seen anyone use Defendant's front door, she admitted that Defendant's front door was not visible from anywhere inside her own house— she would have to stand on the street corner to view it.[26] Moreover, her testimony revealed that Jones was not even at home, at any point, during Officer Moore's March 21st surveillance of Defendant's house.[27]

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[22] *Id.*

[23] 6/11/14, 13.

[24] 6/11/14, 15. See also Attached 1, People's Response to Defendant's Motion to Suppress Pursuant to *Franks v Delaware.*

[25] Defense exhibits A, B and C. 7/2/14, 6-7.

[26] 7/2/14, 4-5, 9-10.

[27] Jones testified that she worked Mondays through Fridays, from 8:00 a.m., until 4:15 or 4:30 p.m. 7/2/14, 10. Officer Moore testified that he set up surveillance around noon on March 21st, a Friday. The warrant was signed around 3:00 p.m., and was executed around 5:00 p.m.

Officer Lynn Moore testified that, since the confidential informant he mentioned in paragraph 2 of his affidavit was unregistered, he kept no records on other cases in which that confidential informant gave him information.[28] Officer Moore further testified that he set up surveillance at around noon and he personally observed the March 21st events that he described in the affidavit.[29] He testified that he was undercover when he approached the fifth individual who entered and exited 15786 Freeland. Using the street name for marijuana, Officer Moore asked that person if "they're still selling trees out of the house down the street." That person told Officer Moore to go to the front door and they would hook him up.[30]

After the attorneys completed direct and cross-examination, Judge Morrow took over the questioning and asked Officer Moore about the execution of the search warrant that took place some five hours after the police surveillance at the location.[31] Judge Morrow asked by what authority did the police confiscate Defendant's vehicle that was parked in his garage. Officer Moore testified that the vehicle was within the curtilage of the house and it was taken for forfeiture proceedings.[32] Judge Morrow asked whether the police had taken any televisions or laptops from the house. Officer Moore replied that he did not believe so and did not remember even seeing anything like that in the house. Judge Morrow asked him if the police confiscated items related to sale, manufacture, use,

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7/2/14, 16-19; 7/3/14, 11, 15-17.

[28]7/2/14, 12-15.

[29]7/2/14, 16-19; 7/3/14, 11-17.

[30]7/3/14, 7, 13-14.

[31]7/2/14, 16-19; 7/3/14, 11, 15-17.

[32]7/3/14, 24-25.

storage, or distribution, such as small ziplock baggies, scales, books, or tally sheets. Officer Moore replied that they did not, but the police did recover three large bags containing 345.4 grams of marijuana.[33]

Judge Morrow held that the information given to Officer Moore by the confidential informant was not reliable and credible because the confidential informant did not have personal knowledge that marijuana was being sold out of the house.[34] Striking that information from the search warrant, Judge Morrow held that Officer Moore's affidavit was a reckless disregard for the truth. He found that since the police recovered no evidence showing that drugs sales were taking place at the house, he did not credit Officer Moore's account that he observed five unknown persons approach the house over a period of 30 minutes, nor that the fifth person to exit the house told Officer Moore that he could buy marijuana there. For these reasons, Judge Morrow entered an order suppressing the evidence and dismissed Defendant's case.[35]

The People appealed that order by right. In a per curiam opinion, dated October 20, 2015, the Court of Appeals reversed Judge Morrow's order suppressing the evidence and remanded for reinstatement of the charges against Defendant. In its opinion, the Court of Appeals enumerated the evidence that Defendant set forth in support of his motion for a *Franks* evidentiary hearing: "defendant alleged that: (1) it was unbelievable that the confidential informant referred to in the affidavit actually existed; (2) although the officer stated that he saw people coming in and out of defendant's front door, the front door of defendant's house is not used, as stated in defendant's

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[33]7/3/14, 25-27.

[34]7/3/14, 42-45.

[35]7/3/14, 45-50.

affidavit; and (3) although the officer stated that he spoke to a person who left defendant's house about whether marijuana could be purchased there, such person did not exist." The Court of Appeals ruled that Defendant provided no support for his claim that the confidential informant did not exist and the person the officer spoke to about marijuana being sold from defendant's house did not exist. Further, it held that "defendant's affidavit averring that his front door had not been used in about six months was insufficient to support his claim that the affiant lied about seeing people going in and coming out of defendant's house through the front door. There was no evidence that defendant was home, or that the door was not operational, at the time surveillance was being conducted."

The Court of Appeals' opinion never mentioned an affidavit by Angela Jones or photographs.

On March 30, 2016, this Court ordered oral arguments on Defendant's application for leave to appeal and ordered that the parties file supplemental briefs addressing "whether the Court of Appeals erred in concluding that *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), limited the trial court's discretion to order a hearing on the sufficiency of the affidavit in support of the search warrant."

Introduction

Based on Defendant's statement of facts, he should win this appeal. The problem is that Defendant's statement of facts is actually fiction. That is, if it were true that he had submitted with his *Franks* motion an affidavit from the across-the-street neighbor which substantially undermined the critical claims made by the search warrant affiant, it would not have been an abuse of discretion to grant an evidentiary hearing. But Defendant didn't submit this affidavit until he filed his Application for Leave to Appeal with this Court, and that failure is dispositive. It shows that Judge Morrow did not grant the hearing based on any substantial offer of proof, but rather on his own desire to cross-examine the affiant, which is clearly improper. It is this which made the *Franks* hearing an abuse of discretion, and this Court would do well not to rely on Defendant's misrepresentation of the lower court record in holding otherwise.

ARGUMENT

I.

***Franks v Delaware* limits the scope of granting a hearing challenging the veracity of a search warrant to cases where a defendant makes a substantial offer of proof, verified by affidavits or sworn or otherwise reliable statements of witnesses, that point out specifically where the warrant affiant intentionally or recklessly provided false information necessary to the finding of probable cause. Here, the judge ordered a *Franks* hearing based on conclusory allegations and a mere desire to cross-examine the affiant. The Court of Appeals correctly applied *Franks v Delaware* by setting aside the trial court's grant of a *Franks* hearing where Defendant failed to meet his burden.**

Appellate Standard of Review

Generally, a lower court's ruling on a motion to suppress evidence is reviewed de novo and its factual findings for clear error.[36]

Discussion

Both the United States and Michigan constitutions "guarantee the right of persons to be secure against unreasonable searches and seizures."[37] Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'"[38] the courts have a strong preference for warrants and have declared that "in a doubtful or marginal case a search under a warrant may be sustainable where

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[36] *People v Custer*, 242 Mich App 59, 64 (2000), rev in part on other grounds, 465 Mich 319 (2001).

[37] *People v Kazmierczak*, 461 Mich 411, 417 (2000); US Const, Am IV; Const 1963, art 1, § 11.

[38] *Johnson v United States*, 333 US 10, 14, 68 S Ct 367, 369, 92 L Ed 436 (1948).

without one it would fall."[39] Accordingly, the "preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination."[40]

- *Franks v Delaware announced a rule of limited scope under which a defendant may attack the veracity of a search warrant*

In *Franks*, the United States Supreme Court, cognizant of the value of a magistrate's role, reiterated that; '[t]here is, of course, a presumption of validity with respect to the affidavit supporting a search warrant."[41] But the Court rejected an absolute ban on post-search impeachment of veracity of an affidavit, ruling that "[w]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing."[42] The Court announced a rule in which the veracity of the affidavit may be challenge under "a *limited scope* both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded."[43] The Court stated that allowing an evidentiary hearing, "after a suitable preliminary proffer of material falsity, would not diminish the importance and solemnity of the warrant-issuing process."[44] Furthermore, the Court held that requiring the

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[39]*United States v Ventresca*, 380 US 102, 106, 85 S Ct 741, 744, 13 L Ed 2d 684 (1965).

[40]*Id*, 380 US, at 108–109.

[41]*Franks*, 438 US at 171.

[42]*Id*, 438 US at 164-165, quoting *United States v Halsey*, 257 F Supp 1002, 1005 (S.D.N.Y.1966).

[43]*Franks*, 438 US at 167. (Emphasis added.)

[44]*Id*, 438 US at 169.

defense to first establish a *substantial* preliminary offer of proof would "suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction."[45]

> In sum, the *Franks* Court held, to merit a hearing, the challenger's attack:
>
> 1) Must be more than conclusory and must be supported by more than a mere desire to cross-examine.
>
> 2) There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons.
>
> 3) Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.
>
> 4) Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.
>
> 5) Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.
>
> 6) On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.[46]

- *A substantial preliminary showing, under Franks v Delaware, requires an offer of proof that is considerable in amount, value, or worth.*

A defendant may overcome the warrant's presumption of validity only with a substantial showing of specific and material falsity.[47] By requiring a "substantial" showing, *Franks* limited the

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[45] *Id*, 438 US at 170.

[46] *Id*, 438 US at 171-172.

[47] *Id*, 438 US at 172.

evidentiary hearing only to cases where a defendant can make an offer of proof that is considerable in amount, value, or worth.[48]

The federal courts agree that the burden of making a substantial showing under *Franks* is a heavy one, since ample mechanisms already exist in pretrial stages of the criminal process to protect innocent citizens' rights, such as the threshold requirement of probable cause for the issuance of a warrant, the magistrate judge's right to demand further evidence and to take testimony, the finding by a grand jury that a true bill should issue, as well as other preliminary procedures afforded before trial.[49] "With the defendant's burden in attacking a search authorized by a facially valid warrant so heavy, so too is his burden in establishing the need for a hearing on the issue."[50]

The federal courts have consistently held that a defendant's own self-serving statement is an insufficient offer of proof to qualify as a substantial showing under *Franks*.[51] Moreover, an offer of

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[48]Webster's Third New International Dictionary 2280 (1976) (defining "substantial" as "considerable in amount, value, or worth"). See, e.g., American Heritage Dictionary of the English Language 1738 (5th ed.2011) (defining "substantial" as "[c]onsiderable in importance, value, degree, amount, or extent"); 17 The Oxford English Dictionary 67 (2d ed.1989) (defining "substantial" as "[o]f ample or considerable amount, quantity, or dimensions").

[49]*United States v Jeffus*, 22 F3d 554, 558 (4th Cir.1994).

[50]*Id*, 22 F3d at 558; See also *United States v Heilman*, 377 F App'x 157, 179-80 (3d Cir 2010); *United States v Bennett*, 905 F 2d 931, 934 (6th Cir1990); *United States v Brown*, 68 F Supp 3d 783, 792 (M.D. Tenn. 2014); *United States v Palmer*, 27 F App'x 343, 349 (6th Cir 2001);*United States v Wajda*, 810 F 2d 754, 759 (8th Cir 1987)(The substantiality requirement is not lightly met); *United States v Cleveland*, 964 F Supp 1073, 1077 (ED La 1997); *United States v Stegemann*, 40 F Supp 3d 249, 261-62 (N.D.N.Y. 2014); *United States v Swanson*, 210 F3d 788, 790 (7th Cir 2000)(The proofs required by *Franks* "are hard to prove, and thus *Franks* hearings are rarely held.").

[51]*Reyes-Reyes v Toledo-Davila*, 860 F Supp. 2d 152, 162-64 (D.P.R. 2012); *United States v Rodriguez-Suazo*, 346 F3d 637, 648 (6th Cir 2003); *United States v McDonald*, 723 F2d 1288, 1294 (7th Cir 1983); *United States v Andujar-Ortiz*, 575 F Supp 2d 373, 377 (D.P.R. 2008); *United States v Johnson*, 580 F 3d 666, 671 (7th Cir 2009); *United States v Taylor*, 931 F Supp

proof must directly contradict specific statements in the affidavit and set forth evidence that those events did not, in fact, occur; general denials or an offer of proof based on speculation and conjecture will not suffice; "[w]ithout a substantial preliminary showing of contrary facts, appellant's contentions are insufficient to warrant a *Franks* hearing."[52]

To more precisely define the quality of evidence necessary to establish a "substantial" showing under *Franks*, the federal courts have often borrowed language from Rule 41(e), Federal Rules of Criminal Procedure, and have required that an offer of proof be "sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question."[53] In *People v Voss*,[54] the state appellate court in Illinois upheld the trial court's denial of a *Franks* hearing, ruling that the defendant's self-serving statement and the potentially biased affidavits from his girlfriend and friends and roommates did not qualify as a substantial preliminary showing without "other objective indicia of reliability."[55] The *Voss* Court went on to provide an extensive "framework" of relevant factors to consider in determining whether a substantial preliminary showing has been made: 1) whether the defendant's motion is supported by affidavits from interested parties or disinterested third persons; 2) whether

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1447, 1458 (N.D. Ind. 1996);*United States v Barrientos*, 758 F2d 1152, 1159 (7th Cir.1985); *United States v Rosario-Miranda*, 561 F Supp 2d 157, 162 (D.P.R. 2008).

[52]*McDonald, supra*, 723 F2d 1288; *United States v Pritchard*, 745 F2d 1112, 1119 (7th Cir 1984); *United States v Lucca*, 377 F 3d 927, 931 (8th Cir. 2004).

[53]*United States v Pena*, 961 F2d 333, 339 (2d Cir 1992) (internal quotation marks and citations omitted); See also *United States v Licavoli*, 604 F2d 613, 621 (9th Cir 1979); *United States v Ledesma*, 499 F 2d 36, 39 (9th Cir 1974).

[54]*People v Voss*, 2014 IL App (1st) 122014, 11, 24 NE 3d 128, 132.

[55]*Id.*

the defendant has available any objective evidence to corroborate the affidavits such as records of hours worked or receipts for travel or other activities; 3) whether the defendant's offer of proof, accepted as true, renders it impossible for the confidential informant's testimony to be true; 4) whether the matter asserted by the defendant is merely an unsubstantiated denial that he engaged in the conduct giving rise to probable cause; 5) whether the information supporting probable cause is the result of a police investigation or information supplied by an informant or other confidential source; 6) if probable cause is based on information from a confidential source, whether the warrant affiant took steps to corroborate that information; 7) the facial plausibility of the information provided by the confidential source; 8) whether the affiant had any prior experience with the confidential source that would enhance the source's reliability; 9) whether there exist any circumstances that should counsel against believing the information provided by the confidential source; and 10) whether the confidential source appeared before the issuing magistrate who had the opportunity to examine the source and assess his or her credibility.[56]

- *The Court of Appeals correctly applied Franks when it ruled that Defendant failed to meet his burden.*

First, applying the principles and restrictions set forth in *Franks,* the Court of Appeals was correct that Defendant's offer of proof was insufficient to constitute a substantial showing to require a hearing. Defendant's own self-serving affidavit alleging that the front door to his house had not been used for approximately six months did not qualify as an offer of proof that is considerable in amount, value, or worth. At most, Defendant alleged that *he* had not used his front door in six months. Even assuming that is true, Defendant does not directly contradict the affiant's statements

[56] *Id.*

that the door was opened by someone else during the officer's surveillance, particularly since this offer of proof did not allege that Defendant was home during the surveillance and since the search warrant did not describe Defendant as the seller.[57] Since Defendant's speculative and self-serving statement does not directly oppose the affiant's statements, it does not amount to a substantial preliminary showing.[58]

Second, while it is unclear whether Judge Morrow reviewed Defendant's affidavit prior to granting Defendant's motion to hold a *Franks* hearing, it matters little because Judge Morrow never relied on that affidavit as his basis for granting the hearing. The record shows that, after ruling that the search warrant provided sufficient probable cause,[59] Judge Morrow immediately turned to Defendant's second argument, that "the [affiant] is lying and that he didn't make the observations that he made on 3/21. So, we'll hear that."[60] Without further argument, Judge Morrow ordered the affiant to provide him with records of "all the times that that affiant has used this unregistered confidential informant on search warrants and the return of search warrants for all that were issued for this unregistered confidential informant and that whatever field notes that are used so that this Court can be assured that the unregistered confidential informant is the same one."[61] Judge Morrow

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[57]The search warrant describes the seller is a black male twenty-five to twenty-seven years old. At the *Franks* hearing, Officer Moore testified that Defendant was not the person who he observed conducting the sales from the front door during his surveillance. See Search Warrant; 7/2/14,16-17.

[58]The Court of Appeals' opinion *only* mentioned Defendant's affidavit because he did not file Angela Jones's affidavit until his application for leave with this Court.

[59]6/11/14, 3-13.

[60]6/11/14, 12-13.

[61]*Id.*

explained that he wanted to review those records in order to establish "whether the affiant is reckless or careless, was a blatant liar. . . .as it relates to March 21st, 2014."[62] The record shows that, *only after* Judge Morrow ordered the hearing, did defense counsel mention an offer of proof, stating, "Your Honor, my witnesses, just to give this Honorable Court a proffer, my witnesses are two points. The young lady across the street. The second on the witness -- Those are just friends. The second witness is just the defendant himself about that front door is never used."[63]

The record supports the conclusion that Judge Morrow never considered whether Defendant's affidavit was sufficient (it was not)— he misused the veracity hearing simply to subject the police officer to cross-examination, contrary to *Franks v Delaware*.[64]

Moreover, Judge Morrow *did* hold a *Franks* hearing on July 2 and July 3, 2014, *and* it was apparent that he did not consider Defendant's offer of proof even then. *Franks* expressly states that in order to prevail at the hearing the defendant must prove his claim of perjury by a preponderance of the evidence.[65] Defendant's first witness was Angela Jones, Defendant's neighbor and friend who lived across the street from Defendant's house. While Jones testified that she has never seen anyone use Defendant's front door, she admitted that Defendant's front door was not visible from anywhere inside her own house— she would have to stand on the street corner to view it.[66] Moreover, her

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[62]*Id.*

[63]6/11/14, 13.

[64]438 US at 170.

[65]*Franks*, 438 US at 156.

[66]"If I look out my front door, I'm looking at an empty field because it's a school right across. But my side door, if I look out my side door, I see his side door." To see Defendant's front door, Jones testified, "I would actually have to leave out and stand on the corner to see his front door." 7/2/14, 9-10. Notably, if Defendant had filed Jones's affidavit at the time of the

testimony revealed that she was not at home at any point during Officer Moore's March 21st surveillance of Defendant's house.[67]

Officer Lynn Moore testified that, since the confidential informant he mentioned in paragraph 2 of his affidavit was unregistered, he kept no records on other cases in which that confidential informant gave him information.[68] Officer Moore further testified he personally observed the March 21st events that he described in the affidavit.[69] He testified that he was undercover when he approached the fifth individual who entered and exited 15786 Freeland. Using the street name for marijuana, Officer Moore asked that person if "they're still selling trees out of the house down the street." That person told Officer Moore to go to the front door and they would hook him up.[70]

After the attorneys completed direct and cross-examination, Judge Morrow took over the questioning and asked Officer Moore questions about the execution of the search warrant that took place about five hours after the surveillance. Judge Morrow asked Officer Moore under what authority did the police confiscate Defendant's vehicle that was parked in this garage. Officer Moore

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Franks hearing, the prosecutor could have revealed as false Jones's claim in that sworn statement that she has "direct view of the front porch and the side door of Mr. Franklin's home."

[67] Jones testified that she worked Mondays through Fridays, from 8:00 a.m., until 4:15 or 4:30 p.m. 7/2/14, 10. Officer Moore testified that he set up surveillance around noon on March 21st, a Friday. The warrant was signed around 3:00 p.m., and was executed around 5:00 p.m. 7/2/14, 16-19; 7/3/14, 11, 15-17.

Notably, if Defendant had filed her affidavit at the time of the *Franks* hearing, the prosecutor could have revealed the falsity of Jones's statement: "That during the past year I have observed the address **15786 Freeland** on a daily basis, at all times of the day and night." (Emphasis in original).

[68] 7/2/14, 12-15.

[69] 7/2/14, 16-19; 7/3/14, 11-17.

[70] 7/3/14, 7, 13-14.

testified that the vehicle was within the curtilage of the house and it was taken for forfeiture proceedings.[71] Judge Morrow asked whether the police had taken any televisions or laptops from the house. Officer Moore replied that he did not believe so and did not remember even seeing anything like that in the house. Judge Morrow asked him if the police confiscated items related to sale, manufacture, use, storage, or distribution, such as small ziplock baggies, scales, books, or tally sheets. Officer Moore replied that they did not, but the police did recover three large bags containing 345.4 grams of marijuana.[72]

Judge Morrow first found that the information given to Officer Moore by the confidential informant was not reliable and credible because the confidential informant did not have personal knowledge that marijuana was being sold out of the house, so it was a "careless disregard" to use the informant's information in the search warrant.[73] But the magistrate did not rely on the unregistered confidential informant's statement to Officer Moore to find probable cause. That information merely explained why Officer Moore set up surveillance at 15786 Freeland on March 21, 2014. It was Officer Moore's personal observations on that date that established probable cause, as Judge Morrow originally held.

After striking the confidential information, however, Judge Morrow's held that Officer Moore's affidavit was a "reckless disregard for the truth" because, during the execution of the search warrant— some five hours after the surveillance—the police recovered no evidence that was indicative of drug sales. Accordingly, Judge Morrow did not credit Officer Moore's account that

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[71]7/3/14, 24-25.

[72]7/3/14, 25-27.

[73]7/3/14, 42-45.

he observed five unknown persons approach the house over a period of 30 minutes, nor did he credit his testimony that the fifth person to exit the house told Officer Moore that he could buy marijuana there. Without ever mentioning Defendant's evidence, Judge Morrow entered an order suppressing the evidence.[74] This "evidence" was wholly insufficient to set aside the issuing magistrate's credibility conclusion.

Since Defendant offered no evidence that could show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause, Judge Morrow erred by suppressing the evidence.[75]

- *Conclusion*

This Court asked whether the Court of Appeals erred in concluding that *Franks v Delaware*[76] "limited the trial court's discretion to order a hearing on the sufficiency of the affidavit in support of the search warrant."

The People reply that the United States Supreme Court, in *Franks,* indeed limited a trial court's discretion to grant a hearing challenging the veracity of a search warrant to cases where a defendant makes a substantial offer of proof, verified by affidavits or sworn or otherwise reliable statements of witnesses, that point out specifically where the warrant affiant intentionally or recklessly provided false information necessary to the finding of probable cause; otherwise, the

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[74]7/3/14, 45-50.

[75]*Franks*, 438 US at 156; *People v Stumpf*, 196 Mich App 218, 224 (1992); *People v Poindexter*, 90 Mich App 599, 609 (1979).

[76]*Franks, supra.*

presumption that the warrant is valid stands. Judge Morrow did not grant the hearing based on the requirements set forth by *Franks v Delaware*, but merely because he wanted to subject the police officer to cross-examination, in spite of the principles so carefully protected in that decision. Since Judge Morrow was not authorized to order a hearing, the Court of Appeals did not err by setting aside Judge Morrow's order suppressing the evidence after improperly granting a hearing.

Moreover, even though Judge Morrow's order to go beyond the four corners of the affidavit based on nothing more than Defendant's vague challenge to the affiant's credibility was legally erroneous, his order to suppress the evidence *after* the *Franks* hearing— based on nothing— was indefensible.

When the Court of Appeals decided this case, it reviewed the lower court record *as it stood* and correctly ruled that Defendant's affidavit was an insufficient basis for Judge Morrow to grant a *Franks* hearing. This was not an oversight as Defendant had yet to file Jones's affidavit. Accordingly, the Court of Appeals correctly applied the law and its opinion should be allowed to stand. The premise of Defendant's appeal before this Court is fictitious and should not be allowed to proceed.

RELIEF

WHEREFORE, the People request this Honorable Court to deny Defendant's application for leave to appeal.

Respectfully submitted,
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Date: June 3, 2016.

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs **No. 152840**

DARIUS LAMARR FRANKLIN,

Defendant-Appellant.

Court of Appeals No. 322655
Circuit Court No. 14-003800-FH

ATTACHMENTS

1. People's Response to Defendant's Motion to Suppress and for Hearing to Suppress Pursuant to Franks v Delaware

2. Copy of Defendant's affidavit, dated June 11, 2014, obtained from Circuit Court file.

3. Affidavit of Assistant Prosecutor Haddy Abouzeid

4. Search warrant of 15786 Freeland, dated March 21, 2014